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## Subcontracting and Employment Security - In the Light of Fibreboard - Fibreboard Paper Products v. NLRB, 379 U.S. 203(1964)

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Comment / Subcontracting and Employment Security—  
In the Light of *Fibreboard*—*Fibreboard Paper Products v.*  
*NLRB*, 379 U.S. 203 (1964)

IN ITS RECENT DECISION in *Fibreboard Paper Products v. N.L.R.B.*<sup>1</sup> the Supreme Court has once again raised the dander of the businessman's labor relations analyst, has befuddled union counsel as to when redress will be available, and has failed to clarify the current issues in industrial negotiations relating to "subcontracting"<sup>2</sup>

The Court ruled that an employer, even though acting for purely economic motives, is obligated to bargain collectively in good faith with the union representing maintenance employees over a decision to subcontract out that work formerly performed by the employees in the existing bargaining unit. This landmark decision was a mixture of broad principles with narrow application to the facts of the particular case, resulting in a lack of guidance for the N. L. R. B., the Courts and representatives of both labor and management.

It is the object of this comment to analyze the *Fibreboard* opinions of the Board, the Court of Appeals and the ultimate decision of the Supreme Court in light of past Supreme Court cases, the high court's disposition of the *Adams Dairy* case and the Board's modification of its subcontracting standard.<sup>3</sup>

<sup>1</sup> *Fibreboard Paper Products Co. v. NLRB*, 379 U.S. 203 (1964).

<sup>2</sup> See generally, address by Francis A. O'Connell to the Industrial Relations Society of New York, "The Inflexible Duty to Bargain," January 21, 1965, 58 LRR 51. See also panel discussion on "Collective Bargaining: New Bench Marks and Their Implications," American Management Association's Personnel Conference, Chicago, Ill., 58 LRR 148.

<sup>3</sup> Although the Supreme Court addressed itself to the issue of the Board's statutory authority to remedy a violation of Section 8(a)(5) by ordering resumption of the subcontracted operations and the reinstatement with back pay of the former employees.

## I. FIBREBOARD BEFORE THE BOARD AND COURTS

*A. Statement of the Case*

Local 1304<sup>4</sup> was the exclusive bargaining agent of the maintenance employees at the Emeryville, California, plant of Fibreboard Paper Products Corporation.<sup>5</sup> The unit of employees represented by Local 1304, numbering about fifty,<sup>6</sup> was composed of maintenance mechanics, electricians, firemen and engineers employed in the power house. The collective bargaining agreement in existence was due to expire on July 31, 1959.<sup>7</sup>

In accordance with the terms of the contract, the union notified Fibreboard on May 26, 1959, more than sixty days prior to the expiration of the agreement, of its desire to negotiate a modification of the current agreement. Despite this timely notification, primarily as a consequence of the stalling tactics of the company, no actual bargaining transpired until July 27, 1959, four days before the expiration date of the agreement.<sup>8</sup>

At the July 27 meeting, the company informed the union that negotiations would be of no value since the decision to contract out the maintenance operation, thereby displacing all the employees represented by the Steelworkers, had already unilaterally and irrevocably been made.<sup>9</sup> A final meet-

<sup>4</sup>East Bay Union Machinists Local 1304, United Steelworkers of America AFL-CIO. (Hereinafter referred to as "steelworkers" or "union").

<sup>5</sup>Hereinafter referred to as "Fibreboard" or "company" or "employer".

<sup>6</sup>According to the trial examiner's report the unit consisted of 73, approximately 50 of whom were represented by the steelworkers.

<sup>7</sup>The trial examiner found that a bona fide collective bargaining relationship had been established some time in 1937 and has existed continually since that time.

<sup>8</sup>These dilatory tactics were amplified by the court in the following passage:

On June 2, the Company acknowledged receipt of the Union's notice and stated:

"We will contact you at a later date regarding a meeting for this purpose." As required by the contract, the Union sent a list of proposed modifications on June 15. Efforts by the Union to schedule a bargaining session met with no success until July 27, four days before the expiration of the contract, when the Company notified the Union of its desire to meet. 379 U.S. 203 at 205-206.

In the trial examiner's Intermediate Report is found more detail and chronological statement of these dilatory tactics. On the 26th of June the business representative for Local 1304 requested a meeting. He was requested by a company representative to postpone such a meeting until the week of July 12. During that week the union's representative was not even able to contact, much less meet with the company's representative. The negotiations remained at this stage until the morning of July 27 when the union was informed that it was the company's intention to eliminate the entire unit by a subcontracting arrangement. It was only after the union was informed of this decision that the company requested a meeting with the union for the afternoon of July 27. 130 NLRB 1558 at 1567-68.

<sup>9</sup>The letter delivered to the union during the July 27 meeting highlights the unilateral manner in which the company's decision was reached. The letter read in pertinent part:

For some time we have been seriously considering the question of letting out our Emeryville maintenance work . . . and have now reached a definite decision to do so effective August 1, 1959. In these circumstances we are sure you will realize that negotiation of a new contract would be pointless. 130 NLRB 1558 at 1568.

The unilateral decision, it should be noted, was not without rhyme, reason, or merit. As cited in the Intermediate Report of Trial Examiner Howard Myers, exhaustive studies and

ing between the Steelworkers and Fibreboard, held on July 30, was of no avail; the company merely reiterated its position as announced at the July 27 meeting.

A natural consequence of the termination of the contract on July 31 was the establishment of a picket line on the evening of July 31, 1959. In addition to this picketing activity, the union filed unfair labor practice charges with the N. L. R. B. in which it was alleged that Fibreboard had violated Sections 8 (a) (1), (3) and (5) of the National Labor Relations Act.<sup>10</sup> The General Counsel's office, pursuant to the authority given in Section 10 (b) of the Act,<sup>11</sup> issued a complaint alleging those violations raised by the union's initial charge.

### B. Original Board Decision

The trial examiner, after taking testimony in a two day hearing, recommended in his Intermediate Report that the charges be dismissed.<sup>12</sup> The rationale used by the trial examiner<sup>13</sup> and initially adopted by the Board was that the decision to subcontract its maintenance work in the Emeryville plant was motivated by purely economic reasons, showed no union animus and was, therefore, not in violation of the Act.<sup>14</sup>

In this decision, Member Fanning filed a dissent in which he argued that the Supreme Court's ruling in *Railway Telegraphers*<sup>15</sup> and the Board's decision in *Timken Roller Bearing*<sup>16</sup> compelled a different result than that reached by the majority. Fanning's dissent forecasted both the Board's result and reasoning on reconsideration and ultimately the Supreme Court's decision. His rationale can best be capsuled as follows:

As a result of the majority's decision, employers by the simple expedient of uni-

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analysis of the maintenance operators at Fibreboard's Emeryville plant had begun some five years earlier and were updated immediately prior to the termination of the Steelworker contract. These cost studies together with discussions with prospective subcontractors allowed the trial examiner to make a finding of fact that the potential savings "might run as high as \$225,000 per year". 130 NLRB 1565 at 1572.

<sup>10</sup> 49 STAT. 452 (1935), 29 U.S.C. § 158 (a) (1) (3) and (5) (1956).

<sup>11</sup> 49 STAT. 453 (1935), 29 U.S.C. § 160 (b) (1956).

<sup>12</sup> 130 NLRB 1558 at 1565 (1961).

<sup>13</sup> *Id.* at 1565-74.

<sup>14</sup> *Id.* at 1559.

<sup>15</sup> *Order of Railroad Telegraphers v. Chicago and N.W.R. Co.*, 362 U.S. 330 (1960). Even though the *Telegraphers* case was governed by the Railway Labor Act it should be noted that in the *Inland Steel Co. v. NLRB*, 170 F. 2d 247 (7th Cir. 1948), it was held that the duty to bargain under the National Labor Relations Act is broader in scope than the Railway Labor Act. "A comparison of the language of the two acts shows that Congress in the instant legislation must have intended a bargaining provision of broader scope than contemplated in the Railway Labor Act." *Id.* at 254-55.

<sup>16</sup> *Timken Roller Bearing Company*, 70 NLRB 500, *enforcement denied on other grounds* 161 F. 2d. 949 (6th Cir. 1947).

laterally subcontracting work may abolish every job in a collective bargaining unit and thereby eliminate union representation.<sup>17</sup>

### *C. Town and Country Decision*

In April of 1962, some thirteen months after its original decision, the Board, its composition altered by appointments of President Kennedy,<sup>18</sup> set the stage for a dramatic reversal in determining what was a mandatory subject of collective bargaining. In the *Town and Country Manufacturing Company* case,<sup>19</sup> the new majority found, with Member Rodgers dissenting, that unilateral subcontracting motivated by union animus violated Section 8 (a) (5) of the Act.<sup>20</sup>

By way of dictum, the Board established the rigid rule that a decision to subcontract motivated by purely economic reasons is a mandatory subject of collective bargaining.

Accordingly, even if Respondent's subcontract was impelled by economic or I.C.C. considerations, we would nevertheless find that Respondent violated Section 8(a) (5) by failing to fulfill its mandatory obligation to consult with the union regarding its decision to subcontract.<sup>21</sup>

In accordance with this dictum, the Board expressly overruled *Fibreboard*,<sup>22</sup> the motion for reconsideration of which was still undecided.<sup>23</sup>

### *D. Supplemental Fibreboard Decision*

The Board, sitting in a three-man panel, followed both the letter and spirit of the Fanning dissent in the original *Fibreboard* decision.<sup>24</sup>

<sup>17</sup> 130 NLRB 1558 at 1564.

<sup>18</sup> There were two Kennedy appointments made in 1961 which according to some authors changed the entire field of labor law. See generally McGUINN, *NEW FRONTIER NLRB* (1963). Chairman McCulloch was appointed on March 7, 1961 but took no part in the first *Fibreboard* decision issued on March 22, 1961. Member Brown commenced his term August 27, 1961. Member Fanning who wrote the dissent in the original *Fibreboard* opinion was appointed by President Eisenhower and reappointed by President Kennedy in 1962.

<sup>19</sup> 136 NLRB 1022 (1962).

<sup>20</sup> *Id.* at 1027.

<sup>21</sup> *Id.* at 1027-28.

<sup>22</sup> "Upon reconsideration of the *Fibreboard* opinion, we are now (of) the view that it unduly extends the area within which an employer may curtail or eliminate entirely job opportunities for its employees without notice to them or negotiation with their bargaining representative." 136 NLRB 1022 at 1027.

<sup>23</sup> Although the various petitions for reconsideration were filed by the Steelworkers counsel on May 15, 1961, and by the General Counsel's Office on June 7, 1961, the Board's Supplemental Decision and Order was delayed pending the outcome of *Town & Country*, *supra*. The second or supplemental decision in *Fibreboard* was issued on September 13, 1962, some five months after *Town & Country* came down, and 34 months after the issuance of the Trial Examiner's Intermediate Report.

<sup>24</sup> *Fibreboard Paper Products Corporation*, 138 NLRB 550 (1962). The panel was composed of Chairman McCulloch and members Fanning and Rodgers, with the latter writing in dissent.

Accordingly, for the reasons and considerations expressed in *Town and Country* and in the dissenting opinion in the original *Fibreboard* case, we find that Respondent's failure to negotiate with the charging union concerning its maintenance work constituted a violation of Section 8(a) (5) of the Act.<sup>25</sup>

In using what was ultimately to become the reasoning of the Supreme Court, the Board embraced two earlier decisions of the highest court in establishing the mandatory nature of bargaining over subcontracting.<sup>26</sup> In *Railway Telegraphers*, the employer sought to eliminate a number of small stations manned by agents who were, at the time, performing less than one hour's work per an eight hour day. The Telegraphers' union sought to reopen the contract, proposed a clause prohibiting the abolition of any existing job and threatened to strike in the event that the employer refused to bargain about this issue. The employer sought to enjoin the union from calling such a strike, claiming that the request was related to "rates of pay, rules and working conditions." *A fortiori*, so their argument went, a strike called over the refusal to bargain about the elimination of these jobs would not be a "labor dispute" covered by the Norris-LaGuardia Act and, therefore, would be enjoinable.<sup>27</sup> For purposes of this comment, it is sufficient to say that the Supreme Court, in *Telegraphers*, held that such a dispute was well within the intended purview of the Railway Labor Act.<sup>28</sup> As in *Fibreboard*, the broad issue in the *Telegraphers*' case was whether the elimination of jobs is a "condition of employment" within the meaning of our Federal labor laws.

In relying on *Teamsters v. Oliver*, the Board reminded the parties that the Supreme Court has stamped approval on its original position on subcontracting as set out in *Timken Roller Bearing*, i.e. subcontracting is a mandatory subject of bargaining.<sup>29</sup> The situation which confronted the Court in *Oliver* was whether state anti-trust laws could be applied to a provision of a collective bargaining agreement setting out a "minimum rental to be paid by the employer motor carriers who leased vehicles to be driven by their owners rather than the carriers' employees . . ." The Court found that the agreement was upon a subject matter as to which the National Labor Relations Act directed the parties to bargain and, hence, anti-trust statutes could not be applied to prevent the effectuation of the agreement. The Court observed that the subject of minimum truck rentals for independent contractors was an issue which could potentially create "curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service"<sup>30</sup> and was, therefore, a "condition of employment."

<sup>25</sup> *Id.* at 551.

<sup>26</sup> *Telegraphers*, *supra* note 15, and *Teamsters v. Oliver*, 358 U.S. 283 (1959).

<sup>27</sup> *Telegraphers*, *supra* note 15 at 332-334.

<sup>28</sup> 44 Stat. 577 (1926), 45 U.S.C. § 152. First (1954).

<sup>29</sup> *Fibreboard*, *supra* note 24, at 554.

<sup>30</sup> *Teamsters v. Oliver*, *supra* note 26, at 294.

### *E. Court of Appeals' Decision*

In affirming the Board's decision, the Court of Appeals for the District of Columbia chose as its vehicle the broad policy considerations of industrial "self-government" and a concept "that collective bargaining must be flexible without precise delineation".<sup>31</sup> The following excerpt exhibits the conceptual approach of the Court of Appeals to the duty to bargain:

In framing Section 8(d) of the Act, 29 U.S.C. §158(d), Congress was incorporating the decisions of the Board and the Courts defining the duty to bargain collectively. The statutory definition of those subjects about which the parties were required to bargain was of necessity framed in the broadest terms possible: wages, hours, terms and conditions of employment. The use of this language was a reflection of the congressional awareness that the act covered a wide variety of industrial and commercial activity and a recognition that collective bargaining must be kept flexible without precise delineation of what subjects were covered so that the Act could be administered to meet changing conditions.<sup>32</sup>

### *F. The Supreme Court Opinion*

#### *1) Petitioner's Argument*

After the D. C. Circuit handed down its decision, counsel for Fibreboard petitioned for redress from the Supreme Court.<sup>33</sup> In arguing that both the Board and Circuit Court were in error, the petitioner exhorted the Court to find that it was only the effect of the decision to subcontract and not the decision itself which must be dealt with in the collective bargaining process.<sup>34</sup> Acknowledging that such a decision does have an "impact" on members of the bargaining unit, Fibreboard insisted that such would be the case no matter what managerial decision was made concerning the maintenance and/or production operations of the company. To require bargaining over decisions of "impact", so went the argument, would give little stabilization to management directives and completely usurp the area of management prerogative.<sup>35</sup> The true requirement of section 8 (d) of the Act, according to the company, was not that all matters of "impact" be discussed at negotiations but only those having an impact "on wages, hours and conditions of employment." Thus, a decision to subcontract, in and of itself, had no impact on

<sup>31</sup> *East Bay Union of Machinists v. NLRB*, 322 F.2d 411 (1963).

<sup>32</sup> *Id.* at 414.

<sup>33</sup> The Court of Appeals handed down its decision on July 3, 1963. Both a petition for rehearing before the Division and En Banc were denied on September 27, 1963. Counsel for Fibreboard petitioned for certiorari on November 8, 1963, and the Court granted it on January 6, 1964.

<sup>34</sup> See Brief for Petitioner in *Fibreboard* in the U. S. Supreme Court, p. 14.

<sup>35</sup> *Id.* at 16-18.

these "wages, hours and working conditions" and was, therefore, not covered by 8 (d) nor was there a violation of 8 (a) (5) to refuse to negotiate concerning a decision to subcontract out. However, in making the distinction between the decision and its effect, counsel for Fibreboard readily admitted the company's statutory duty regarding the latter.<sup>36</sup>

The petitioner further argued that this "impact" theory of the Board, if unchecked, would logically require the company to bargain over every decision imaginable.<sup>37</sup> In addition, even if this onus was accepted by the company, there would always be the possibility that the decision made after the bargaining would be reversed years later for failure of the negotiations to conform to "the erratic notions" that the Board and courts have set up.<sup>38</sup>

## 2) *The Board's Argument*

The Board, arguing for enforcement of its Decision and Order and affirmance of the Court of Appeals, urged the court to give the words "terms and conditions of employment" the broadest possible reading so that "any stipulation which either party considers" vital to its interests may become such a term or condition.<sup>39</sup> This reading, according to the Board, would carry out the basic policy of the Act "by bringing a troublesome problem within the framework Congress established as most conducive to just and peaceable industrial relations."<sup>40</sup>

The Board further argued that the established practice in collective bargaining clearly illustrates that "stipulations" dealing with subcontracting are within the purview of "terms and conditions of employment." In showing this "established practice", the Board explained the diverse methods which are employed so that the bargaining representative will have some voice and perhaps control over "letting out" of work which is, should or will be performed by the members of the unit.<sup>41</sup>

Answering the general claim that, to require bargaining over whether to subcontract out the work of an existing unit, would undercut industrial effi-

<sup>36</sup> *Id.* at 14, 22.

<sup>37</sup> *Id.* at 21.

<sup>38</sup> *Id.* at p. 11. In the Circuit Court opinion, the Court stated that the company had a statutory duty to have "prior discussions" on the decision to subcontract so as to bargain to an "impasse." 322 F.2d at 413. For the possibility of the managerial decision being "reversed some years later", see Footnote 23 above. In addition to the thirty-four month delay between the Trial Examiner's report and the Board's supplemental decision and order, we have four months from the time of the decision of the company to let this work out to the Trial Examiner's report (38 months to Board decision) and another twenty-six months after the Board's decision until the Supreme Court's opinion came down. In short, sixty-four months between the decision to subcontract out the work at Emeryville and the ultimate reversal by the Supreme Court.

<sup>39</sup> Brief for Respondent in *Fibreboard* in the United States Supreme Court, p. 23.

<sup>40</sup> *Id.* at 8.

<sup>41</sup> *Id.* at 29-36 and materials cited therein.



ciency, the Board proffered that the only statutory requirement imposed is that, in certain circumstances, the employer and the bargaining representative negotiate about any proposals offered by either party on the subject. The requirement and the extent of such negotiations, it was argued, will, of course, depend upon the terms of the existing or just expired agreement, the effect on the unit, the business necessities involved, the nature of the subcontracting, etc.<sup>42</sup> In admitting the possible infringement on what has been held by some as an "absolute prerogative" to run an efficient operation, the Board called the Court's attention to its own language in *Wiley v. Livingston*:

... the objectives of national policy, reflected in established principles of federal law, require the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers be balanced by some protection to employees from a sudden change in the employment relationship.<sup>43</sup>

The Board also relied on the earlier Supreme Court cases of *Railway Telegraphers* and *Oliver*, along with a number of Circuit Court opinions to buttress its contention that "contracting out" was a mandatory subject of collective bargaining.<sup>44</sup>

In essence, the Board's position in relying on *Telegraphers* is that the Supreme Court found in *Telegraphers* the existence of a labor dispute within the framework of *Norris-LaGuardia*; that this labor dispute was brought about by union attempts, in compliance with the statutory commands of the Railway Labor Act, to bargain over a change in "rates of pay, rules and working conditions", i.e. closing of way stations on the railroad line; that the labor dispute, as defined in *Norris-LaGuardia* and found in *Telegraphers*, is the same as that in Section 2 (9) of the National Labor Relations Act; that the words "terms and conditions" found in the definition of a labor dispute in Section 2 (9) of the National Labor Relations Act have the same meaning in Section 8 (d) which requires parties to bargain collectively over "terms and conditions" and Section 9 (a) of the Act which allows for the exclusive representative to bargain for those "terms and conditions"; that terms and conditions, including "rates of pay, rules and working conditions" of the Railway Labor Act are "no broader" than terms and conditions embraced in the pertinent sections of the National Labor Relations Act; that the lack of a realistic distinction between the statutes makes the alleged distinction between shutting down part of a company's operation and the subcontracting out of work formerly done by employees just as impossible and unrealistic.<sup>45</sup>

<sup>42</sup> *Id.* at 9.

<sup>43</sup> *Ibid.*, quoting *Wiley v. Livingston*, 376 U.S. 543, 549.

<sup>44</sup> Brief for Board, note 39, *supra*, at pp. 51-57.

<sup>45</sup> *Id.* at 55-57.

The Board, in seeking support in the *Oliver* decision, reminded the Court that, in *Oliver*, it was faced with the issue of whether the National Labor Relations Act preempted the labor relations field against applying a state anti-trust statute to a minimum truck rental clause in a collective bargaining agreement. In that case, the Court held that the contract provision in question was the result of the parties' mandatory obligation to bargain over terms and conditions. The Board urged that, in the *Oliver* case, the agreement treated a form of subcontracting and that the only factual difference between *Fibreboard* and *Oliver* was that the latter dealt in "piecemeal" subcontracting while the former dealt with contracting out of unit employees' work in one fell swoop.<sup>46</sup>

### 3) *The Court's Decision*

a) *Majority Opinion.* The Court announced at the outset of its opinion that the "contracting out" of work formerly done by an existing unit had the inevitable result of the "termination of employment" of those unit employees and therefore "well within the literal meaning of the phrase 'terms and conditions of employment'."<sup>47</sup>

To fortify this literal reading of the statute, the Court linked such an interpretation with broad policy considerations of the Act. Chief Justice Warren, speaking for the majority, reasoned that "contracting out," if included as a mandatory subject of bargaining, would "effectuate the purposes of the National Labor Relations Act."<sup>48</sup> In taking up this cause, which appears to exemplify the implicit breadth of the decision,<sup>49</sup> the Court affirmed the Board's decision, with the admonition that such a result,

would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.<sup>50</sup>

To further buttress its conclusion, the Court examined the "industrial bargaining practices" prevalent throughout the country. The majority reasoned that such an approach would be beneficial in determining "the propriety of including a particular subject within the scope of mandatory bargaining."<sup>51</sup> In its examination, the Court found substantial evidence that "contracting out in one form or another" has been widely accepted as a subject of bargaining.<sup>52</sup>

<sup>46</sup> *Id.* at 57.

<sup>47</sup> *Fibreboard v. NLRB*, *supra* note 1, at 210.

<sup>48</sup> *Ibid.*

<sup>49</sup> See text accompanying footnotes 84 and 85, *infra*.

<sup>50</sup> *Fibreboard v. NLRB*, *supra* note 1, at 211.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

As final support for its decision, the Court relied heavily upon the Board's position concerning the applicability of *Oliver* to the instant case.<sup>53</sup> In borrowing from both the reasoning and language of the Board's brief, the Court found the only distinction between the two cases was

that the work of the employees in the bargaining unit was let out piecemeal in *Oliver*, whereas here the work of the entire unit has been contracted out.<sup>54</sup>

As a preliminary to the actual admonition that the decision was not meant to, nor did it extend to other "forms of 'contracting out' . . . which arise in our complex economy,"<sup>55</sup> the Court went to great lengths to show how these facts, in this particular dispute, made the submission to mandatory "collective negotiation" the only feasible solution.<sup>56</sup> To dissuade the doubts expressed in the concurring opinion, the majority noted that Fibreboard was not precluded from managing its business as it sought; this unilateral decision to contract out the unit work included no plans for "capital investment;" and the work was still to be performed in the plant, and under basically the same conditions.<sup>57</sup> Thus, the replacement of unit employees by those who were to perform basically the same work as the unit people was the only matter which the Court was "explicitly" addressing itself to. This "limitation" or "lack of extension" is discussed elsewhere in this comment.<sup>58</sup>

b) *Concurring Opinion*. Justice Stewart, joined by Justices Douglas and Harlan, admittedly concerned with the "disturbing breadth" of the majority opinion and unappeased by its recurring theme of limitation, filed an opinion concurring in the result "within the narrow limitations implicit in the specific facts of this case."<sup>59</sup>

As his first point of departure Stewart questions the use of the "industrial experience" as promulgated in the majority. Without doubting its validity in principle he queries as to the propriety of the "industrial experience" test employed by the majority. The fact that "contracting out" is mentioned in a number of collective bargaining contracts or the subject of a number of grievances indicates to Stewart no more than that the parties may have considered it mutually advantageous to bargain over these issues on a *permissive* basis.<sup>60</sup>

<sup>53</sup> See text accompanying footnotes 40 through 46, *supra*, for an enunciation of the Board's argument as well as text accompanying footnotes 70 through 80, *infra*, which discusses both *Oliver* and *Telegraphers* as used by the Supreme Court in its decision.

<sup>54</sup> *Id.* at 212.

<sup>55</sup> *Id.* at 215.

<sup>56</sup> *Id.* at 213-214.

<sup>57</sup> *Id.* at 213.

<sup>58</sup> See text accompanying footnotes 84 through 97, *infra*.

<sup>59</sup> *Fibreboard v. NLRB*, *supra* note 1, at 219.

<sup>60</sup> *Id.* at 220 (Emphasis supplied).

Stewart further warned that the "limiting purpose" of the NLRA as seen in both the words of the Act<sup>61</sup> and its legislative history<sup>62</sup> requires that courts develop the most narrow of concepts in "delineating a limited category of issues which are subject to the duty to bargain collectively."

Mr. Justice Stewart's admonition of a narrow interpretation was prompted by what he termed "passages in the Court's opinion . . . which suggest . . . an expansive interpretation" by implying "that any issue which may reasonably divide an employer and his employees must be a subject of compulsory collective bargaining."<sup>63</sup>

After discussion of the possible, and perhaps the natural results from this impliedly broad approach of the majority opinion, Justice Stewart, in conclusion, discussed the prime areas of future conflicts in the area of subcontracting. "Automation and onrushing technological change", according to the Justice, are problems of vital concern to the economy and might therefore require either government or organized labor or both to soften the "potentially cruel impact [of automation and change] upon the lives and fortunes" of the workingman. This, however, is a problem that looks to Congress for solution, not to an expanding judicial construction of the Taft-Hartley Act.<sup>64</sup>

## II. FORMS OF SUBCONTRACTING

To understand the complexity of the issues left unresolved by the Supreme Court's decision, a survey of the various forms of subcontracting which arise in the industrial world is essential.<sup>65</sup> For purposes of this comment, it is helpful to delineate the broad categories of subcontracting rather than attempt an exhaustive catalogue. We are concerned primarily with the distinction between work which can be performed by the employees in the bargaining unit, using currently available equipment and skills, and work which cannot be performed by the existing work force for a variety of reasons.<sup>66</sup> For exam-

<sup>61</sup> The concurring opinion argues that the statute *specifies* wages, hours and other conditions of employment as those subjects upon which the parties are bound to confer.

<sup>62</sup> In the conference report accompanying the Taft-Hartley Act, Justice Stewart pointed out that the spirit of the House version of Taft-Hartley was part of the final bill. The House version was most specific and detailed as to what were mandatory subjects of bargaining. H.R. 3020, 80th Cong., 1st Session, 2 (11) (B) (VI) (1947).

<sup>63</sup> *Fibreboard v. NLRB*, *supra*, note 1, at 221.

<sup>64</sup> *Id.* at 225, 226.

<sup>65</sup> For a more detailed discussion of the business practices embodied in the term "subcontracting" see Young, *The Contracting Out of Work* 4-10 (1964). See also Brief for Respondent in *Fibreboard* in the U.S. Supreme Court, pp. 7-13, and Amicus Brief of the Electronic Industries Association, pp. 5-10.

<sup>66</sup> Query whether the employer may unilaterally subcontract work which requires only a minimal amount of training at a time when unit employees who ordinarily perform other jobs have been laid off. A "substantial impact on the bargaining unit" test would infer a bargaining requirement before closing avenues of continued employment to members of the bargaining unit.

ple, the employer may lack the necessary machinery or equipment; the employees may not possess the requisite skills; the number of employees in the unit may be inadequate or the demands of production during peak periods may compel the temporary assistance of an outside subcontractor. As to all of these forms of subcontracting which recur daily in our economy, the Court's opinion in *Fibreboard* does not concern itself since, by definition, they do not have an immediate impact on the tenure of employment of members of the bargaining unit.

The problem areas are centered on subcontracting practices which pose a threat to the tenure of employment or other conditions of employment of members of the bargaining unit. A condition precedent to the existence of an employer's duty to bargain about a decision to subcontract is the possibility that the work involved can be performed by unit employees. Thus, a primary question in subcontracting cases is whether the employees have the requisite skills to perform the work.<sup>67</sup> A condition of full employment in the bargaining unit would also resolve the employer's doubts as to whether he is free to subcontract work which does not detract from the employment of the unit members. And certainly, the *Fibreboard* opinion does not suggest that the employer must invest in new machinery rather than subcontract out a new phase of operation even if some members of the unit are unemployed.

Within the area of work which can possibly be performed by employees in the bargaining unit, a considerable diversity of situations exist in which the issue of subcontracting might arise. The employer may subcontract work on a day-to-day basis. May the unit demand the employer bargain about such daily decisions when employment in the bargaining unit declines? Is it significant that unit employees have ever performed such work? If the unit acquiesced in a subcontracting decision during a period of full employment, is it precluded from seeking to recapture work previously performed by unit employees?

On a long term subcontract, similar questions arise as well as the question: May the unit request bargaining during the duration of a long term subcontract despite the contractual obligations of the employer to the subcontractor?

Subcontracting may occur at different significant times in the unit-employer relationship. The employer may decide to subcontract during the union organizational drive, during the pendency of a petition for an N.L.R.B. election, during, beginning or after an election,<sup>68</sup> during a strike,<sup>69</sup> during the

<sup>67</sup> For example, the common practice in the construction and defense—related industries is not within the scope of the *Fibreboard* opinion. In those industries, a contract is executed with a general contractor who employs subcontractors to perform the specialized work. See Brief for Respondent in U.S. Supreme Court, 13-14.

<sup>68</sup> See *NLRB v. Rapid Bindery, Inc.* 293 F.2d 170 (2d Cir. 1961).

<sup>69</sup> See *Hawaii Meat Co. v. NLRB*, 321, F.2d 397 (9 Cir. 1963).

term of a collective bargaining agreement, during negotiations for a new agreement as in *Fibreboard*, or after the expiration of a contract, during negotiations for a new contract.

The illustrations set out above are graphic examples of the issues which evolve from subcontracting in present day industrial society. To argue that the Supreme Court decision in *Fibreboard* has answered these questions with a flat "no subcontracting without bargaining" rule would be naive.

### III. CASES RELIED ON BY SUPREME COURT

The basic facts and propositions of law emanating from both *Oliver* and the *Railway Telegraphers* cases have been elaborated upon earlier.<sup>70</sup> The use of the *Railway Telegraphers* proposition that job elimination "is well within the literal meaning of the phrase 'terms and conditions of employment' "<sup>71</sup> indicates that, perhaps, the Supreme Court was, in fact, struggling to find a much broader base for the definition of mandatory subjects of bargaining. This is so regardless of the majority's cautioning remarks that there was no attempt to expand "the scope of mandatory bargaining" and that the "decision need not and does not encompass other forms of contracting out".<sup>72</sup> The Court obviously revived the spirit of the *Telegraphers* case with the rationale that elimination of jobs by changed methods of operation is an area of vital interest and, as such, is a mandatory subject of bargaining.<sup>73</sup> This concern with the elimination of jobs squarely places the Board in the arena foreseen by Mr. Justice Stewart in his concurring opinion, i.e. "automation and onrushing technological change."<sup>74</sup> It should be here noted that Mr. Justice Stewart, while recognizing that the elimination of jobs is a burning issue in present industrial society, nevertheless maintains that the framework of judicial innovation, absent an amendment to the Taft-Hartley Act, should not settle such disputes.<sup>75</sup> Furthermore, the citation of the *Telegraphers* opinion would negate the limitation of the *Fibreboard* opinion to its particular facts. Unlike the *Telegraphers* case, in *Fibreboard* "the company's decision to contract out the maintenance work did not alter the company's basic operation,"<sup>76</sup> whereas, in *Telegraphers*, the basic issue was whether the company

<sup>70</sup> See text accompanying footnotes 26 through 30 and 39 through 46.

<sup>71</sup> *Fibreboard v. NLRB*, *supra* note 1, at 210.

<sup>72</sup> *Id.* at 215.

<sup>73</sup> *Id.* at 210.

<sup>74</sup> *Id.* at 225.

<sup>75</sup> See, however, the Court of Appeals decision of *Fibreboard* wherein the D.C. Circuit decided that the phrase "conditions of employment" was by congressional design meant as a broad formulation to resolve industrial conflicts in light of contemporary standards. 322 F.2d 411 at 414.

<sup>76</sup> *Id.* at 213.

unilaterally could alter its "basic operation" by "abolishing" certain way stations.<sup>77</sup>

This "broader base" theory as applied to *Oliver*, the major case relied on by the Court in *Fibreboard*, flies in the face of the desire to limit the scope and effect of the *Fibreboard* decision. In *Oliver*, the issue was, as stated by the Court in *Fibreboard*, whether the employer must bargain over the possible "curtailment of jobs and the undermining of conditions of employment."<sup>78</sup> At the same time as it argued for the limiting of its decision to the abolition of an entire unit of employees by a subcontracting device, the Court reaffirmed the principle of the *Oliver* case that the possible, gradual curtailment of jobs is a mandatory subject. Taking the principle of *Oliver* and applying it to a variation of the *Fibreboard* fact situation, we readily see that piecemeal subcontracting, which falls short of the elimination of an entire unit, would nevertheless be a mandatory subject of bargaining.

In essence, regardless of the limitation of *Fibreboard* to its own facts, the rationale of the ultimate decision must be placed in a framework of preexisting law, i.e. *Railway Telegraphers* and *Oliver*. As a corollary to this, it should be noted that *Fibreboard* has brought the two above-named decisions out of their respective narrow setting of Norris-LaGuardia and alleged anti-trust violations<sup>79</sup> and focused on the applicability of the cases in the broader area of the interpretation of the term "conditions of employment."<sup>80</sup>

#### IV. ADAMS DAIRY CASE

Upon the supposition that the *Fibreboard* opinion had, for the time being, given the needed guidance to the various Circuits, the Supreme Court granted certiorari in the *Adams Dairy* case.<sup>81</sup>

In its opinion, the Eighth Circuit had not been receptive to the Board's argument that a decision to subcontract out an entire unit's work was a mandatory subject of bargaining.<sup>82</sup>

The Supreme Court's remand of the *Adams Dairy* case buttresses the earlier mentioned tenet that the Supreme Court was establishing a broad principle in the *Fibreboard* case. By ordering reconsideration in light of the *Fibreboard* case, the Court has asked the Eighth Circuit to hold that a deci-

<sup>77</sup> *Telegraphers*, *supra* note 15, at 332.

<sup>78</sup> *Fibreboard v. NLRB*, *supra* note 1, at 212.

<sup>79</sup> See Brief for Petitioner in *Fibreboard* in the U.S. Supreme Court, 23-26. See also Farmer, *Good Faith Bargaining Over Subcontracting* 51 GEO. L. J. 558 (1963). Farmer, *Bargaining Requirements in Connection with Subcontracting, Plant Removal, Sale of Business, Merger and Consolidation*, 14 LABOR LAW JOURNAL 951 (Dec. 1963).

<sup>80</sup> See Brief for Respondent, note 42 *supra*, at 54-57. See also Freilicher, *Collective Bargaining and Contracting Out*, 13 FED. B. J. 332 at 342 (1963).

<sup>81</sup> *NLRB v. Adams Dairy*, 379 U.S. 644 (1965).

<sup>82</sup> *NLRB v. Adams Dairy*, 322 F.2d 553 (8 Cir. 1963).

sion to contract out while an agreement is in effect, which decision currently eliminates the unit covered by the existing agreement, is a mandatory subject of bargaining. In the *Adams* case, the union's contract had two and a half years to run before expiration. In *Fibreboard*, when the final decision was reached to subcontract out, the collective bargaining agreement between the company and the Steelworkers was about to expire. This, in and of itself, is broadening the original holding.<sup>83</sup>

#### V. PROJECTING THE "BROAD BASE"

Well aware that the majority opinion was grounded on a "broad base", potentially applicable to areas of employment security quite distinct from the factual setting in *Fibreboard*, Justice Stewart, in his concurring opinion, strove to foreclose any such extension of the decision. Thus, he states:

An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control.<sup>84</sup>

Justice Stewart's concern highlights the significance of the reasoning behind the majority's opinion. The majority's concern with the elimination of unit jobs potentially extends far beyond the borders of *Fibreboard's* facts into management decisions to introduce labor-saving technological innovations and to relocate or withdraw from business entirely. In fact, the NLRB has already carried their approach that far.<sup>85</sup>

In concerning itself with the impact of subcontracting on employment security of bargaining unit employees and with the policy of promoting industrial peace through collective negotiation in troublesome areas of labor-management relations, the Court grants recognition to the employees' interests in decisions which affect tenure of employment and the public's interest in the accommodation of the conflicting interests of labor and management by collective bargaining, rather than open economic warfare.

<sup>83</sup> For an interesting discussion of the substantial difference between the mandatory nature of bargaining over subcontracting during the life of the agreement and the transitional period see Farmer note 53, *supra*. Perhaps it will be this distinction that the 8th circuit will use as the vehicle to maintain its earlier position. Although neither the Supreme Court on its granting the petition for certiorari nor the 8th. Cir. in its original decision give any weight to this distinction, the latter might find itself impressed with the majority's admonition that the *Fibreboard* decision was necessarily limited.

<sup>84</sup> *Fibreboard*, *supra*, note 1 at 223.

<sup>85</sup> See e.g., *Darlington Mfg. Co.*, 139 NLRB 241 (1962), *enforcement denied*, 325 F.2d 682 (4th. Cir. 1963), *remanded for reconsideration* March 29, 1965 (redistribution of work within corporate entity); *Renton News Record*, 136 NLRB 1294 (1962) (introduction of labor-saving machinery); and *Star Baby Co.*, 140 NLRB 678 (1963) *enforced as modified*, 334 F.2d 601 (2d. Cir. 1964) (decision to go out of business).



Thus, while the Supreme Court has not ruled that every employer decision directly affecting job security is a mandatory subject of bargaining, it has clearly established that the employee has a legitimate interest in decisions as to whether or not his job will continue to exist. Granting this employee interest in job security, courts faced with problems arising from automation or plant relocation decisions must, at the least, balance the conflicting interests of employees and entrepreneurs. The Court, in *Fibreboard*, demands an accommodation of competing claims and has dictated the preferred method of settling differences—the bargaining table. No longer can the Courts rely on a strict “management rights” theory in cases involving employment termination issues. An analysis and balancing of admittedly divergent interests is the least that the *Fibreboard* opinion commands.

## VI. THE EVOLVING BOARD DOCTRINE

### A. Case-by-Case Approach

The complexity of situations in which *Fibreboard* and *Town and Country* might be applied is limited only by the imagination of labor and management personnel and the variety of business activity. Faced with a host of cases<sup>86</sup> in which distinctions from *Fibreboard* have been argued, the NLRB has retreated from its seemingly rigid prior position that the decision to subcontract unit work, involving a total or partial elimination of the bargaining unit, is a mandatory subject of bargaining.

Thus, in *Hartman Luggage*,<sup>87</sup> we find the Board agreeing with the trial examiner that a showing of unilateral employer action in signing a subcontracting agreement to lease his entire operation without consulting the union only establishes a *prima facie* case of refusal to bargain. Such evidence might be overcome, the Board reasoned, by good faith bargaining subsequent to the decision and also by the employer's conduct prior to the decision. In short, the Board in *Hartman* evidenced an intention to adopt a case-by-case analysis of particular subcontracting practices, discarding its prior *per se* violation theory.

In *Shell Oil Co.*,<sup>88</sup> the Board propounded a statement of its new approach to *Fibreboard*-type cases:

<sup>86</sup> According to the quarterly report issued by the office of the General Counsel of the NLRB, for the period ending June 30, 1964, the Regional Advice Branch had considered in that quarter 175 cases in which there was a subcontracting issue. In almost half of these cases, the charges were dismissed, in the great majority of those remaining complaints did issue.

<sup>87</sup> 145 NLRB 1572 at 1572-73 (1964). This approach followed in *Georgia-Pacific Corporation*, 150 NLRB No. 88 (1965).

<sup>88</sup> 149 NLRB No. 26 (1964).

The principles of these earlier cases, however, are not meant to be hard and fast rules to be mechanically applied irrespective of the circumstances of the case. In applying these principles we are mindful that the permissibility of unilateral subcontracting will be determined by a consideration of the setting of each case. Thus, the amount of time and discussion required to satisfy the statutory obligation 'to meet at reasonable times and confer in good faith' may vary with the character of the subcontracting, the impact on employees, and the exigencies of the particular business situation involved. In short, the principles in this are not, nor are they intended to be, inflexibly rigid in application.<sup>89</sup>

### *B. The "Substantial Impact" Test*

A primary consideration in the evolving Board doctrine has been the impact of the subcontracting decisions on the employment of members of the bargaining unit. While not limiting *Fibreboard* to its own facts, i.e. the elimination of the unit represented by the union, the Board has been reluctant to require bargaining where there has been no "substantial impact" on the work available to the unit employees. In *General Motors Corp.*,<sup>90</sup> the Board found that the employer's decision to lease the operation of a parking lot previously manned by UAW employees did not "result in any substantial impairment of the bargaining unit."<sup>91</sup> In that case, the former parking lot employees were reassigned to assembly line work at "comparable" wage rates.

In *Westinghouse Electric Corporation*,<sup>92</sup> the Board was faced with a situation in which contracting out of work was extensive and firmly established as a company practice. More than seven thousand subcontracts were in issue, the majority of which involved work within the capabilities of the existing labor force. Bargaining about these daily decisions to subcontract, the Board ruled, was not required by Section 8 (a) (5). The following limitations were held to be implicit in prior landmark cases:

In the *Fibreboard* line of cases, where the Board has found unilateral contracting out of unit work to be violative of Section 8(a) (5) and (1), it has invariably appeared that the contracting out involved a departure from previously established operating practices, effected a change in conditions of employment, or resulted in a significant impact on job tenure employment security, or reasonably anticipated work opportunities for those in the bargaining unit.<sup>93</sup>

<sup>89</sup> *Ibid.* In this case the employer notified the union of a proposed transfer of trucking account to a new location a few days before the effective date of the change. The employer met with the union and assured the negotiators that no employees in the unit would be laid off or discharged. The Board emphasized that the decision to transfer, although already reached, could have been reversed.

<sup>90</sup> 149 NLRB No. 40 (1964).

<sup>91</sup> *Ibid.*

<sup>92</sup> 150 NLRB No. 136.

<sup>93</sup> *Ibid.*

Applying these principles to the facts of the case, the Board found no violation because the employer was motivated solely by economic considerations, traditional business methods of the employer had been used, the amount or kind of subcontracting was consistent with the employer's past practice, there was no significant impact on unit employees, and the union could bargain about subcontracting practices at general negotiating meetings.

Recent cases support the conclusion that the primary test currently employed by the Board is whether the effect of the subcontracting will be of detriment to the members of the bargaining unit.<sup>94</sup> In all of these cases, it was conceded that the work was within the capabilities of bargaining unit employees; yet the Board found no violation.

### *C. Inadequacies Of The Test*

This "substantial impact" theory of the Board suffers from a basic defect. It assumes that the employer will be able to foresee the impact of his decision at the time it is made. But the decision is made at a particular point in time and the substantial impact theory freezes that moment for application of the test. Variables such as seasonal or cyclical fluctuations in demand, the composition of the work force and its skills and the in-plant equipment are viewed as constants. While a particular decision to subcontract may not affect the bargaining unit at the moment of decision, subsequent events may show that the bargaining unit was critically affected by such a decision or series of decisions.

At the time of his decision to subcontract, the employer cannot be certain as to the impact of his decision on the future distribution of work among unit employees. He can speak with a high degree of certitude about the present but his projection into the future is no more than an educated guess, subject to the constantly changing conditions in the plant, the industry and the economy as a whole. Yet, he must make a policy decision before he signs a subcontracting agreement. He must then decide whether or not to notify and bargain with the union about his proposed action, keeping in mind that a future impact on the bargaining unit may demonstrate that he violated Section 8 (a) (5).

In cases arising to date under the Board's "substantial impact" doctrine, no indication has been given that potential impact on conditions of employment in the bargaining unit is significant. More appropriately, the Board's primary test should be termed "present substantial impact." Rather than adopting a long range test designed to protect the employees from unilateral

<sup>94</sup> American Oil Company, 151 NLRB No. 45 (1965); Fafnir Bearing Company, 151 NLRB No. 40 (1965); Kennecott Copper Corporation, 148 NLRB No. 169 (1964).

action affecting the conditions of employment, the Board has taken a narrow exclusionary approach to the interpretation of "conditions of employment." Under such a test, the employee is conclusively held to have no interest in the subcontracting decision if it does not presently subject him to a detriment, such as layoff, discharge or reduction of hours.

Yet the employee will be vitally affected by a decision to subcontract out work not being done by unit employees during periods of peak production but which has been done by unit employees in the past during slack periods. He will, likewise, be affected by any permanent or long term decision to subcontract work which is within his competence. As the amount of work performed in the plant decreases, the employee's potential value to the employer diminishes until the employee finds that, if his job is eliminated, there are no alternative jobs within the plant available for him. Subcontracting will have so tightened the job structure at the plant that unit employees have lost any diversity of opportunity. Surely the employees have a vital interest in this process. It affects their tenure of employment and their possibility of advancement.

It is not unreasonable to expect the Board to require bargaining about subcontracting decisions which have a potential future impact on the employees in the unit. It follows from the bargaining requirement over decisions to subcontract which have a substantial impact on the bargaining unit. Whether this impact manifests itself directly or immediately is immaterial. The issue is whether it affects "conditions of employment" for which the employees, through their certified representative, have a right to bargain.

#### *D. Management Rights Analysis*

Much of the controversy over the duty to bargain about subcontracting has been phrased in terms of "management prerogatives" and "employee interests" in "conditions of employment." Thus, the debate over the bargaining duty of the employer was emotionally charged by outcries against the encroachment on principles of free enterprise. Assurances by the Board that bargaining did not require capitulation to union demands<sup>95</sup> did not soften the antagonism of management representatives to the Board's broad approach to the problem.<sup>96</sup>

Recently the Board has adopted, at least as one factor in its decisional arsenal, this "management rights" approach. Where a contract is in effect at the time of the subcontracting decision, a "management rights" clause in that contract has recently been held applicable to decisions to subcontract.<sup>97</sup>

<sup>95</sup> *Town & Country*, *supra*, note 19, at 1027.

<sup>96</sup> See note 2, *supra*.

<sup>97</sup> *General Motors Corp.*, 149 NLRB No. 40; *Shell Oil Co.*, 149 NLRB No. 22.

In *General Motors*, the clause in the employer's agreement with the union gave the employer responsibility for decisions concerning the method and means of its operation, without any specific reference to subcontracting. Here we find the Board reviving a "sleeper" clause, not intended to be applied in derogation of the union's newly discovered "right" to bargain about decisions to subcontract. In *Shell Chemical*, the management rights clause was forged in the heat of bargaining about subcontracting policies of the employer and was more appropriately relied upon by the Board. Significantly, the clause in *Shell* became part of the contract after the Board's decision in *Town and Country* and *Fibreboard*.

In summary, management prerogative clauses are meaningful in resolving subcontracting issues only where the parties contemplated their application to subcontracting issues and specifically included subcontracting among the rights granted to management.

#### CONCLUSIONS

We have seen that the Supreme Court in its reasoning supporting *Fibreboard* employed a "broad base" approach while limiting the decision to the facts in that particular case. Read in the light of prior cases relied on by the Court, the *Fibreboard* decision at least stands for the proposition that a management decision which will eliminate an entire bargaining unit, although based on economic necessity, is a mandatory subject of collective bargaining.

Based on the Court's reliance on the *Oliver* case, it also appears that decisions to subcontract which have a substantial impact on the bargaining unit will be covered by the rule of *Fibreboard*. Whether the Court will agree with the NLRB's limited definition of "impact" on the bargaining unit cannot be discovered from a reading of *Fibreboard* and must await further clarification.

Use of the *Railway Telegraphers* case as a precedent forecasts the reading of Section 8 (a) (5) to include management decisions to introduce automation into a plant, although it is clear that Justices Stewart, Harlan and Douglas would react violently to such a proposal.

Logical extension of the "broad base" theory would also necessarily include decisions to shut down the entire operation of a plant and to go out of business entirely.

In these many and unsettled areas of labor relations law, the Supreme Court in *Fibreboard* has given the labor lawyer abundant material for argument and extension of its decision, while refusing to indicate the direction of its own future decisions.